

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	
Complainant,)	MB Docket No. 12-122
)	File No. CSR-8529-P
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant.)	
)	
Program Carriage Discrimination)	

TO: The Commission

**REPLY OF GAME SHOW NETWORK, LLC
TO CABLEVISION'S EXCEPTIONS TO THE INITIAL DECISION**

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SUMMARY

Reading Cablevision's exceptions to the Initial Decision, one might forget that the Commission's Chief Administrative Law Judge found overwhelming evidence that Cablevision discriminated against plaintiff GSN by moving it from its expanded basic tier to a pay-extra sports tier in 2011. Cablevision essentially asks the Commission to ignore both the deference it normally affords to ALJ findings of fact and credibility determinations and the substantial evidence on which the ALJ relied and which Cablevision's brief systematically omits.

In reality, the extensive record before the ALJ (which included testimony from over a dozen live witnesses and close to 1,000 documents) provides ample support for his carefully reasoned conclusion that Cablevision discriminated against GSN in clear violation of Section 616. GSN established discrimination through direct evidence by proving that Cablevision applied different rules to affiliates and non-affiliates that resulted in wholly different terms of carriage for affiliates and non-affiliates. GSN also established discrimination through circumstantial evidence, by proving differential treatment of similarly situated networks, with no legitimate business or economic justification. As the ALJ correctly found, this discrimination has materially interfered with GSN's ability to compete, justifying the prompt remedy of providing GSN with equal treatment to Cablevision's affiliates and ordering Cablevision to pay the maximum statutory forfeiture.

Cablevision's exceptions largely consist of asking the Commission to disregard the ALJ's factual determinations and reweigh the evidence, or to set a standard for finding discrimination that is at odds with the law and could never realistically be met. Each of Cablevision's variants of these arguments lacks merit:

- **The ALJ properly found direct evidence of discrimination.** The ALJ found ample direct evidence of discrimination in the form of Cablevision's admissions that, at each stage of the retiering process, it applied different tests and rules to GSN than it applied to its affiliates. He found that Cablevision left GSN out of contract to make it easier to retier but that Cablevision's distribution arm "couldn't walk away" from its affiliates; that Cablevision considered retiering only non-affiliated networks and did not apply the same retiering test to its affiliated networks as it applied to GSN; and that the result of those differential tests meant that after the retiering Cablevision told GSN there was nothing it could do to be restored to carriage. Cablevision's attempt to question the legal standard the ALJ applied to GSN's direct evidence falls flat: GSN proved that Cablevision made statements admitting it applied facially discriminatory policies to GSN. That is all the law requires to establish direct evidence of discrimination.
- **The ALJ properly applied the precedent governing circumstantial evidence of discrimination.** The ALJ correctly applied the D.C. Circuit's jurisprudence which permits circumstantial evidence of discrimination to be sufficient when any *one* of three alternative tests is satisfied—(1) by showing that the proffered business justification was pretextual; (2) under the "incremental loss" test, by showing that Cablevision incurred an equal or greater loss from favoring its affiliated networks than it would have incurred from continuing to treat

the unaffiliated network equally; or (3) under the “net benefit test,” by showing that Cablevision would have obtained a “net benefit” from carrying GSN fairly. The ALJ made specific factual findings that support each of these tests, including his rejection of each of Cablevision’s proffered business justifications as mere pretexts for discrimination. Cablevision’s reading of the *Tennis Channel* decision as requiring the ALJ explicitly to conduct a “net benefit” analysis, to the exclusion of the other two tests set forth in *Tennis Channel*, is incorrect—but his decision supports that GSN met that test in any event.

- **The ALJ properly found and the record supports that GSN is similarly situated to WE tv and Wedding Central.** As noted above, the ALJ applied the Commission’s fact-specific test to determine that the credible evidence showed GSN was substantially similar to Cablevision’s affiliates WE tv and Wedding Central, in large part because the networks were all women’s networks that offered similar target programming to the same target audience, and sold advertising based on the same demographics to the same target advertisers.
- **The ALJ properly found and the record supports that Cablevision’s actions unreasonably restrained GSN’s ability to compete fairly.** As a direct result of Cablevision’s discriminatory conduct, GSN suffered material losses, including [REDACTED] of its annual advertising revenue, [REDACTED] of its total subscribers, and [REDACTED] of its Cablevision subscribers. In all, GSN’s total losses due to the tiering totaled [REDACTED] at the time of the hearing and continue to grow. Even Cablevision’s witnesses conceded the unique harm that a network like GSN suffers from action like Cablevision’s. The ALJ correctly found that these significant losses—which made it more difficult for GSN to grow its audience, sell advertising, negotiate with distributors, and develop original programming—were an unreasonable restraint on GSN’s ability to compete. Cablevision’s request that the Commission adopt a standard that would immunize it from any remedy for its discrimination, by importing antitrust doctrine into Section 616, has been rightly rejected by the Commission and the courts, and it ignores the market power Cablevision possesses in New York.
- **Cablevision’s First Amendment argument lacks merit under well-established precedent and its attempt to introduce new evidence is improper.** The Courts and the Commission have repeatedly rejected the notion that Section 616 is an unconstitutional interference with editorial discretion. Cablevision wishes the Commission to reconsider this stance by suggesting—for the first time, now that it faces an adverse decision—that its sale to Altice N.V. many months ago eliminated the government’s interest in prohibiting discrimination in this case. That argument fails on its merits and is also procedurally improper.

In short, Cablevision’s arguments do nothing to disturb the ALJ’s well-supported findings on each element of Section 616. Cablevision’s only basis for prevailing is to persuade the Commission to disregard plainly correct factual findings that are amply supported in the record or to set an unattainable standard under which discrimination could never be proven. Neither basis is proper. Section 616 exists precisely to prohibit the type of discrimination that Cablevision engaged in, and the Commission should affirm the ALJ’s well-reasoned and well-supported conclusions on this point.

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BACKGROUND

Plaintiff GSN is a “female-targeted,” “general entertainment” cable network.¹ Consistent with the independent decisions of the majority of other MVPDs, Defendant Cablevision carried GSN to [REDACTED] million subscribers on its expanded basic tier from 1997 to 2011.² Through all relevant time periods, Cablevision owned various networks to which it gave favorable coverage, including GSN competitors WE tv and Wedding Central.³

The written carriage agreement between GSN and Cablevision expired in [REDACTED].⁴ Cablevision refused to negotiate a new contract, which it never did with its own affiliated networks, instead carrying GSN out-of-contract under the terms of the prior agreement until December 3, 2010.⁵ On that date, without warning, Cablevision informed GSN that it would move GSN to its pay-extra premium sports tier, effective February 2011.⁶ The retiering resulted in GSN’s loss of 96 percent of its [REDACTED] million Cablevision subscribers.⁷

Cablevision never considered retiering the networks it owned, including the [REDACTED] [REDACTED] WE tv and the floundering Wedding Central networks.⁸ To the contrary, internal rules set by the executive who oversaw both Cablevision’s carriage and network businesses (i) precluded Cablevision from “walking away” from its affiliates in negotiations and (ii) required

¹ *Game Show Network, LLC v. Cablevision Sys. Corp.*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 16D-1, at ¶ 10 (ALJ Nov. 23, 2016) [hereinafter, “Initial Decision”]. The Chief Administrative Law Judge is hereinafter referred to as the “ALJ.”

² *Id.*, at ¶¶ 13, 17.

³ *Id.*, at ¶ 13.

⁴ *Id.*, at ¶¶ 22-23.

⁵ *Id.*, at ¶¶ 23-24, 40.

⁶ *Id.*, at ¶ 40.

⁷ *Id.*, at ¶ 10.

⁸ *See, e.g., id.*, at ¶¶ 101, 107.

Cablevision to give the affiliates material benefits, such as gratuitously foregoing [REDACTED]

When Cablevision announced its decision to its subscribers, it received record outrage. The 20,000 calls it received in the initial days following the announcement included the “highest amount of calls coded . . . in one day”—more than Cablevision received when FOX caused Cablevision’s subscribers to miss several weeks of NFL football, the entire National League Championship Series, and two games of the World Series.¹⁰ But Cablevision refused to reconsider its decision, despite material concessions GSN attempted to offer.¹¹ Instead, Cablevision lost more money from its decision by providing the sports tier for free for six-months to approximately 24,000 Cablevision subscribers.¹²

To obtain redress for its discriminatory tiering, GSN filed a Program Carriage Complaint against Cablevision on October 12, 2011.¹³ On May 9, 2012, the Media Bureau found that GSN had made out a *prima facie* case of discrimination by Cablevision, and set the case for a hearing.¹⁴ The HDO directed the ALJ to “develop a full and complete record” and “conduct a *de novo* examination of all relevant evidence” to produce an Initial Decision.¹⁵ The ALJ held a two-week hearing in July 2015, featuring testimony from a dozen live witnesses in addition to

⁹ Montemagno Tr. 1546:22 ([REDACTED]), 1545:2 ([REDACTED]).

¹⁰ *Id.*, at ¶ 45.

¹¹ *Id.*, at ¶¶ 40, 107.

¹² *Id.*, at ¶¶ 47-48.

¹³ *Game Show Network, LLC v. Cablevision Systems Corp.*, Program Carriage Complaint, File No. CSR-8529-P, at ¶¶ 1-2 (filed Oct. 12, 2011).

¹⁴ *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 27 FCC Rcd. 5113, 5121 (MB May 9, 2012) [hereinafter, “HDO”].

¹⁵ HDO, at ¶ 38.

several witnesses produced through deposition, and approximately 1,000 documentary exhibits.¹⁶

On November 23, 2016, the ALJ released a 65-page Initial Decision finding Cablevision had violated Section 616.¹⁷ The Initial Decision included detailed factual findings spanning the entirety of the record of the five-year proceeding. The ALJ found on multiple, alternative bases that Cablevision engaged in discrimination in violation of section 616.

In particular, the ALJ found that GSN first proved discrimination through direct evidence, including based on Cablevision's own admissions:

- Cablevision did not negotiate its affiliate contracts at arm's length.¹⁸ Its affiliates could take disputes with Cablevision's distribution arm to Cablevision COO Tom Rutledge, who would adjudicate those disputes.¹⁹ Cablevision distribution executives admitted at trial that they couldn't "walk away" from negotiations with affiliates.²⁰
- Cablevision considered retiering only non-affiliated networks.²¹ It gave no consideration to retiering or dropping any of its affiliated networks, including those that had expired or expiring carriage agreements.²²
- Cablevision waived the enforcement of [REDACTED] in its affiliate agreements in each of the years [REDACTED], which cost Cablevision

¹⁶ Initial Decision, at ¶ 7.

¹⁷ *See generally* Initial Decision.

¹⁸ *Id.*, at ¶ 101 (citing CV Exh. 121E at 1 (noting programming side received "direction" from COO regarding renewal of expiring affiliate); CV Exh. 315 (discussing carriage-affiliate matters and suggesting Rutledge had to sign off)); GSN Exh. 33 (affiliates would go "crying to dad"); Montemagno Tr. 1546:7-1547:6.

¹⁹ Initial Decision, at ¶¶ 14, 101.

²⁰ Montemagno Tr. 1546:22-1547:6 ([REDACTED]), 1545:2 ([REDACTED]).

²¹ Initial Decision, at ¶¶ 101, 102, 33 nn.148, 152, 34 n.155.

²² *Id.*

██████████ in foregone revenue.²³ Cablevision never waived the enforcement of ██████████ for non-affiliates.²⁴

- Cablevision applied tests to determine carriage for GSN that it never applied to its affiliates.²⁵ And Cablevision considered only unaffiliated networks for retiering, at the same time that Cablevision could have realized the same improvements to its programming budget merely by enforcing, rather than waiving, its ██████████ with its affiliates.²⁶

The ALJ also found that GSN proved discrimination through circumstantial evidence.²⁷

He found that GSN was similarly situated to Cablevision's affiliates WE tv and Wedding

Central, including because both networks carried similar programming, appealed to the same

target audience, and sold advertising targeted at the same demographics and to the same

advertisers.²⁸ He found that Cablevision's decision had no legitimate business justification

because (1) Cablevision lost subscribers, money, and goodwill from the retiering; (2)

Cablevision would have saved more by retiering its affiliates; and (3) the justifications it offered

such as cost-cutting were pretextual.²⁹ From this circumstantial evidence, the ALJ inferred that

the differential treatment of GSN by Cablevision resulted from discrimination.³⁰

The Initial Decision found that GSN suffered actionable harm resulting from

Cablevision's discrimination. In particular, Cablevision's conduct resulted in substantial losses

²³ Initial Decision, at ¶¶ 101, 108; Montemagno Tr. 1593:19-22.

²⁴ Initial Decision, at ¶ 108 n.496 (citing Montemagno Tr. at 1601:20-23 (Montemagno testified that Cablevision ██████████)).

²⁵ See *id.*, at ¶¶ 27 (citing Bickham Dep. 32, 38), 100-09.

²⁶ See *id.*, at ¶ 108.

²⁷ See, e.g., *id.*, at ¶¶ 110-14.

²⁸ See, e.g., *id.*, at ¶ 110, 111.

²⁹ See, e.g., *id.*, at ¶¶ 48 (loss of subscribers), 64 n.325 (incremental loss), 104 (loss of subscribers, goodwill), 102-08 (pretext), 112 n.510 (Cablevision expert admits it would have saved more by tiering affiliate WE tv than it did by tiering GSN).

³⁰ See *id.*, at ¶¶ 110-14.

to GSN in subscribers, license fee revenue ([REDACTED]), ratings, advertising revenue ([REDACTED]), negotiating position with other MVPDs, and ability to compete.³¹

On the basis of these findings, the ALJ ordered Cablevision to restore GSN to the expanded basic distribution tier “as soon as practicable” for a period of five years, pay GSN the [REDACTED] per-subscriber rate that it had paid GSN prior to the retiering, and pay a \$400,000 forfeiture penalty to the Government.³² Cablevision has now filed exceptions to the Initial Decision, to which this pleading responds.

STANDARD OF REVIEW

The Commission reviews an Initial Decision *de novo*, but “[i]t is well established that an ALJ’s determination of the credibility of witnesses at a hearing is due substantial deference.”³³ The Commission has recognized that “[a]bsent extrinsic evidence to the contrary, we believe that [an] ALJ’s judgment . . . is entitled to great weight.”³⁴ The credibility determinations on which the Initial Decision is grounded should not be overturned unless the Commission finds that the Presiding Judge’s determinations were “clearly erroneous.”³⁵ “Weight is given [to] the [ALJ’s]

³¹ ³¹ See generally *id.*, at ¶¶ 99-116.

³² *Id.*, at ¶¶ 124-26.

³³ *Herring Broad. Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Mem. Op. & Order, 26 FCC Rcd. 8971, 8983 (2011).

³⁴ *In re Broadcast Assoc. of Colorado*, 104 FCC 2d 16, 19 (1986).

³⁵ See *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688-89 (1989) (noting that “credibility determinations are reviewed under the clearly-erroneous standard”) (cited by *Tennis Channel, Inc. v. Comcast Cable Commc’ns*, 27 FCC Rcd. 8508, 8522 n.122 (2012)); see also *In re Signal Ministries, Inc.*, 104 FCC 2d 1481, 1486 (Rev. Bd. 1986) (“In the absence of patent conflicts with the record evidence, the Commission accords special deference to a presiding officer’s credibility findings since the trier of fact has had a superior opportunity to observe and evaluate a witness’s demeanor and to judge his/her credibility.”).

determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify.”³⁶ The adjudicator present at trial, who has “lived with the case,” is uniquely able to assess witness credibility — an evaluation which the Commission is simply unable to replicate in its capacity as an appellate body.³⁷ For the same reason, the ALJ’s credibility determinations for written testimony are also given substantial deference.³⁸

Deference to the ALJ is “particularly appropriate” in proceedings with large evidentiary records containing hundreds of transcript pages.³⁹ Here, the ALJ heard testimony from and examined 12 witnesses at trial, some 1,000 exhibits were received into evidence, and the transcript spans more than 3,000 pages.⁴⁰ Cablevision’s suggestion that the ALJ engaged in a “truncated analysis”⁴¹ of evidence is belied by the comprehensive Findings of Fact, which contain extensive discussion of the record evidence and more than 500 footnotes. The care exhibited by the ALJ in assembling and evaluating the exhaustive record shows his analysis to be anything but “truncated.”

ARGUMENT

The ALJ held that GSN established Cablevision’s discrimination through both direct and circumstantial evidence. He found that any business justification Cablevision offered for its conduct was pretextual and that GSN was “unreasonably restrained” in its ability to compete by this conduct.

³⁶ *In re TeleSTAR, Inc.*, 2 FCC Rcd. 5, 12 (Rev. Bd. 1987) (citation and internal quotation marks omitted).

³⁷ *Id.* (“It is the element of an impartial, experienced examiner who has observed the witnesses and lived with the case that entitles the credibility findings of an ALJ to appreciable weight on appeal”) (citation and internal quotation marks omitted).

³⁸ *Molina v. Astrue*, 674 F.3d 1104, 1121 n.13 (9th Cir. 2012).

³⁹ *Signal Ministries*, 104 FCC 2d at 1486.

⁴⁰ Initial Decision, at ¶ 7.

⁴¹ Cablevision Exceptions, at 3.

Each of these findings is supported by the evidence.

Cablevision seeks to avoid these findings by asking to re-litigate the ALJ's well-considered factual findings, and by asking the Commission to read Section 616 out of existence by adopting legal standards that would preclude any remedy for discrimination. The Commission should deny these exceptions and enforce the Initial Decision.

I. THE ALJ'S HOLDING THAT CABLEVISION VIOLATED SECTION 616 WAS CONSISTENT WITH THE LAW AND SUPPORTED BY AN EXTENSIVE RECORD.

Congress clearly stated in Section 616 that an MVPD such as Cablevision cannot make carriage decisions based on its "affiliation" or "nonaffiliation" with a network.⁴² A complainant may prove such discrimination either through direct or circumstantial evidence.⁴³ The ALJ properly found that GSN proved discrimination in both ways.

A. Direct Evidence of Discrimination.

Cablevision repeatedly admitted that, at each step of its retiering decision, it applied discriminatory policies to GSN that it did not apply to its affiliates. Cablevision's attempts to justify those double standards as legitimate business justifications were properly rejected by the ALJ as pretextual. Similarly, Cablevision's attempt to argue that this evidence is not *direct* evidence of discrimination runs well afoul of the law and common sense: admittedly applying a *different set of rules* to GSN than it does to its affiliates is the essence of direct evidence of discrimination.

⁴² 47 U.S.C.A. § 536(a)(3).

⁴³ See Initial Decision, at ¶ 99 ("GSN can make [the required evidentiary] showing by (1) direct evidence such as statements showing a discriminatory intent, or (2) circumstantial evidence such as showing 'uneven treatment of similarly situated entities.'") (citation omitted).

1. Cablevision's Attempts to Redefine the Direct Evidence Standard Fail.

Cablevision resorts to a failed attempt to confuse the legal standard governing direct evidence of discrimination. Cablevision and GSN agree that “direct evidence” of discrimination is evidence that, if true, requires no “inferential leap” in order for a court to find discrimination.⁴⁴ For evidence to be “direct,” GSN merely must demonstrate it shows that “affiliation or non-affiliation ‘actually played a role in th[e] *process* and had a determinative influence on the outcome’” of Cablevision’s carriage decisions.⁴⁵

Cablevision seeks to narrow this standard by asking that evidence only be considered to be direct evidence if it contains an explicit “admission” by the MVPD that it took an adverse carriage action on the basis of non-affiliation.⁴⁶ Under Cablevision’s reasoning, were a company to fire female employees for failing an aptitude test that it administered only to women and not to men, that would not be direct evidence of discrimination so long as the company did not write a memorandum admitting that the employee was fired because she was a woman.

Cablevision’s view is not the law. Instead, direct evidence includes any facts that *compel*

⁴⁴ See Cablevision Exceptions, at 5 (“In defining discrimination under Section 616, the Commission relies on ‘the extensive body of law addressing discrimination in normal business practices’ under Title VII, the ADA, and the ADEA.”); *id.*, at 7 (“Direct evidence is ‘evidence that, if believed, proves the fact of discriminatory animus without inference or presumption.’”) (citation omitted); see also *Bass v. Bd. of Cty. Comm’rs, Orange Cty., Fla.*, 256 F.3d 1095, 1111 (11th Cir. 2001) *overruled in part on other grounds*, *Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008) (Policies or practices that are facially discriminatory, requiring no “inferential leap,” constitute direct evidence).

⁴⁵ See *Tennis Channel v. Comcast Cable Commc’ns*, Recommend Decision, 26 FCC Rcd. 17160, ¶ 105 & n.321 (2011) (quotations omitted and emphasis added); see also *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, ¶ 12 (2010) (“[T]he Order correctly concluded that, under this standard, a vertically-integrated MVPD ‘[may treat] unaffiliated programmers differently from affiliates, [only] so long as it can demonstrate that such treatment did not result from the programmer’s status as an unaffiliated entity.’”) (second alteration in original).

⁴⁶ See Cablevision Exceptions, at i-ii.

the conclusion that unlawful discrimination was “at least a motivating factor in the” relevant decision.⁴⁷ Thus, an admission of the application of “an existing policy which itself constitutes discrimination is direct evidence of discrimination.”⁴⁸ A defendant’s mere denial that it acted pursuant to a facially discriminatory policy does not negate the direct nature of that evidence, but rather only whether the finder of fact credits that evidence.⁴⁹

Precisely such direct evidence existed here. Cablevision made repeated direct admissions that it applied rules to GSN that it never applied to its affiliates, solely on the basis of GSN’s non-affiliation. This “repeated approval of [an] . . . apparent policy of systematic . . . discrimination alone provides ample direct evidence” because it leaves the finder of fact with no conclusion but that the action was discriminatory.⁵⁰ That the Commission has never before faced such a blatant and systemic violation of Section 616 suggests only that the direct evidence

⁴⁷ *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 394-95 (6th Cir. 2008) (characterizing direct evidence of discrimination as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions”); *see also Neufeld v. Searle Labs.*, 884 F.2d 335, 339 (8th Cir. 1989) (holding that “repeated approval of [an] . . . apparent policy of systematic age discrimination alone provides ample direct evidence”); *In re Revision of the Commission’s Program Carriage Rules*, 26 FCC Rcd. 11494, ¶ 12 (2011), vacated in part on other grounds, *Time Warner Cable*, 729 F.3d 137 (noting that direct evidence includes “evidence . . . supporting the facts underlying the claim”) [hereinafter “Second Report and Order”].

⁴⁸ *E.E.O.C. v. Wiltel, Inc.*, 81 F.3d 1508, 1514 (10th Cir. 1996) (citation and quotation marks omitted); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 118-19, 121-22 (1985) (“[D]irect proof of age discrimination” existed where airline applied a different test for a captain’s eligibility to transfer to another position on the basis of that captain’s age.).

⁴⁹ *See, e.g., Bass.*, 256 F.3d at 1110 (noting that a facially discriminatory “affirmative action plan may constitute direct evidence, even when a defendant denies having acted pursuant to its stated plan.”).

⁵⁰ *Neufeld*, 884 F.2d at 339.

here is unusually powerful.⁵¹

2. The Record Provides Ample Direct Evidence of Discrimination.

Specifically, the ALJ found ample direct evidence that, at each stage of the retiering, Cablevision applied discriminatory rules to GSN that it did not apply to its affiliates.⁵²

Prior to the retiering, Cablevision did not, as a matter of policy, negotiate contracts with its affiliates at arms' length. By contrast, its negotiation stance kept GSN out of contract entirely, making GSN easier to retier.

As to Cablevision's policy towards its affiliates, the ALJ found that "[c]ontemporaneous documentary evidence proves by a preponderance that contractual negotiations between Cablevision's programming and distribution sides were not conducted at arms-length but at the direction and under the control of [Cablevision COO Thomas] Rutledge."⁵³ Mr. Rutledge oversaw both the distribution and network arms of Cablevision, and the distribution executives documented their powerlessness to treat their affiliated networks in the same way as they treated non-affiliated networks, because the affiliates would go "crying to dad" (Mr. Rutledge).⁵⁴ Cablevision distribution executive Tom Montemagno admitted that Cablevision's policy of

⁵¹ Thus, Cablevision's suggestion that "there is no Section 616 case in which the Commission (or for that matter Judge Sippel) has held that an MVPD's failure to consider reduced carriage for its affiliates constituted direct evidence" merely enforces the egregious nature of Cablevision's conduct. *See* Cablevision Exceptions, at ii. Never before has the FCC been presented with a case where the evidence that an MVPD systematized its discrimination in favor of its affiliates and against the complainant was so strong as to eliminate any possible non-discriminatory purpose.

⁵² Initial Decision, at ¶ 100 ("Cablevision's admission and other proof as to how Cablevision treats GSN and its affiliated networks differently in the terms and conditions of carriage" constitutes direct evidence of discrimination).

⁵³ *Id.*, at ¶¶ 14, 101.

⁵⁴ GSN Exh. 33; Montemagno Tr. 1546:7-1547:6.

favoritism was so ingrained that Cablevision could not [REDACTED]

[REDACTED]⁵⁵—i.e., that it could not hold them at arm’s length.

By contrast, Cablevision did something with GSN that it by practice never did with its affiliates: it refused to meaningfully negotiate with GSN over a new contract, and it then later used the absence of a contract with GSN to justify tiering GSN.⁵⁶ Stated differently, Cablevision’s discriminatory decision to “walk away” from GSN, when by policy it would never “walk away” from its affiliates, led to a set of facts—GSN not having a contract—that Cablevision then used to justify tiering GSN and not its affiliates.

During the retiering decision, Cablevision followed its practice of admittedly *never* considering retiering or dropping an affiliate.⁵⁷ Correspondingly, Cablevision tiered GSN based on alleged tests that it never applied to its own networks. Mr. Bickham attempted to justify tiering GSN because he purportedly concluded, by watching GSN for a few five- or ten-minute intervals, that it was not “must-have” programming.⁵⁸ But Cablevision never applied this “must-have” test to Cablevision’s affiliates WE tv or Wedding Central.⁵⁹ In fact, Mr. Bickham admitted that [REDACTED] did not have “must-have” programming and that he was “not sure” whether [REDACTED] would pass the “must-have” test.⁶⁰

⁵⁵ Montemagno Tr. 1546:22-1547:6 ([REDACTED]), 1545:2 ([REDACTED]).

⁵⁶ Initial Decision, at ¶ 101.

⁵⁷ *Id.*, at ¶¶ 101, 102, 33 nn.148, 152, 34 n.155.

⁵⁸ Joint Exh. 1, Bickham Dep. 24:23-25, 49:18-50:14, 60:1-21, 76:3-17.

⁵⁹ *Id.* at 107:14-19.

⁶⁰ *Id.*

Similarly, Cablevision claimed that it was trying to save money by tiering GSN, but it never considered the more sizeable savings it could reach by tiering its own networks. As the ALJ found, “with two exceptions, Cablevision would have saved substantially more by retiering just one affiliated network from the expanded basic tier to the premium sports tier” than it did by retiering GSN.⁶¹ In place of considering savings from tiering its own networks, Cablevision actually gave away [REDACTED] dollars every year to them by [REDACTED]

[REDACTED].⁶²

Following the retiering, Cablevision made clear that nothing – whether it was unprecedented consumer outcry or GSN concessions – would influence its decision to tier. GSN witnesses testified about Cablevision’s intransigence,⁶³ but Cablevision proved it through its own admissions: Cablevision executive Tom Montemagno was asked by GSN to negotiate over the decision and responded simply with a statement that “the decision was final;”⁶⁴ Cablevision executive Mac Budill documented in a contemporaneous internal email that, “no. . . . there wasn’t really anything they can do;”⁶⁵ and Cablevision walked away from subsequent negotiations with GSN in March 2011 without ever offering any realistic path for reasonable carriage.⁶⁶ Cablevision similarly refused to reconsider its tiering decision when faced with unprecedented consumer outrage, or to consider whether tiering an affiliated network would be a

⁶¹ Initial Decision, at ¶¶ 107, 33 n.148.

⁶² *Id.*, at ¶¶ 101, 108; Montemagno Tr. 1593:19-22.

⁶³ Initial Decision, at ¶¶ 40 n.181 (citing GSN Exh. 99), 100 n.444.

⁶⁴ *Id.*, at ¶¶ 40 n.181 (citing CV Exh. 337, Montemagno Direct, at 24-25), 100 n.444.

⁶⁵ *Id.*, at ¶¶ 40 n.181 (citing CV Exh. 150), 100 n.444 (ellipses in original).

⁶⁶ *Id.*, at ¶ 108 (finding GSN proved that Cablevision couldn’t “walk away” from affiliate negotiations but declining to find that evidence, of itself, proved a Section 616 violation); GSN Exh. 297, Goldhill Written Direct ¶ 26.

better money-saver, instead throwing away even more money by giving the sports tier away for free to complaining customers.⁶⁷

This post-tiering conduct is further direct evidence of discrimination in two regards. First, it showed Cablevision's willingness to walk away from a non-affiliate no matter how bad that might be for its business when it would never "walk away" from affiliated networks.⁶⁸ Second, it further demonstrates that the "must-have" test Cablevision applied to GSN and not its affiliates was pretextual, because GSN met the test and it still had no impact on Cablevision.

3. Cablevision's Purported Justifications Are Mere Pretexts.

The ALJ's findings with respect to direct discrimination stand alone, but they are reinforced by his rejection of Cablevision's numerous business justifications as pretextual. Cablevision seeks to defend its justifications as "honestly-held belief[s]," even if later proved to be "mistaken," but contemporaneous facts show—as the ALJ found—that they were obviously pretextual at the time.⁶⁹

The ALJ first examined and rejected Cablevision's primary cost-cutting rationale. The ALJ's rejection of this rationale was grounded in the fact that GSN represented "only one-quarter of 1 percent or [REDACTED]" of Cablevision's [REDACTED] 2011 programming budget, so the retiering did not cause a meaningful savings.⁷⁰ He found that "[t]he record shows that [Cablevision's] increased programming costs were due to Cablevision's non-GSN contractual

⁶⁷ Initial Decision, at ¶ 104.

⁶⁸ Montemagno Tr. 1546:22 ([REDACTED]), 1545:2 ([REDACTED]).

⁶⁹ Cablevision Exceptions, at 15.

⁷⁰ Initial Decision, at ¶ 105.

obligations and increased [*sic*] in operating costs,” not the cost of carrying GSN.⁷¹ He observed that “only 30 networks, including affiliates MSG, MSG Plus, and News 12, accounted for a formidable 81 percent of Cablevision’s troublesome 2011 programming costs.”⁷² Had Cablevision truly been motivated by cost savings rather than discrimination, it could have saved more by retiering or dropping one of its affiliates, or by simply [REDACTED] [REDACTED]—but it never even considered those options.⁷³

At the same time, the ALJ relied on evidence showing that Cablevision executive John Bickham “instructed his subordinates ‘to give consideration to potentially dropping’” GSN months before the retiering took place and in the absence of specific cost-cutting pressure.⁷⁴ Bickham “testified that there was no specific pressure coming from his superiors—[Cablevision CEO James] Dolan and [COO Tom] Rutledge—to scale back programming costs or reduce the 2011 programming budget” when retiering GSN was first discussed in July 2010.⁷⁵ Bickham similarly admitted that a July 2010 memorandum regarding the savings from tiering GSN by Cablevision executive Tom Montemagno did not impact his thinking “at all.”⁷⁶ Instead, by November 2010, Mr. Bickham claimed that GSN should be retiered simply because it “d[id] not

⁷¹ *Id.*, at ¶¶ 31, 105.

⁷² *Id.* at ¶¶ 29, 105 (quoting CV Exh. 136 (showing costs of Cablevision affiliates including MSG, MSG Plus, and News 12)).

⁷³ *Id.*, at ¶¶ 101, 108; Montemagno Tr. 1593:19-22, 1601:20-23.

⁷⁴ Initial Decision, at ¶ 27 (quoting CV Exh. 117).

⁷⁵ *Id.*, at ¶ 27.

⁷⁶ Joint Exh. 1, Bickham Dep. 60:7-8.

have ‘must-have programming,’” not because of intense cost-cutting pressure.⁷⁷ In light of this evidence, the ALJ properly held that the cost-cutting rationale was a pretext.

The ALJ next found that Mr. Bickham’s “must-have test” was a pretext. Cablevision’s own networks would fail this test if it were ever applied to them: Mr. Bickham admitted that Wedding Central was not “must-have” programming and he could not affirm that WE tv met the test.⁷⁸

Moreover, the facts at the time proved that GSN did in fact meet the “must-have” test. Cablevision’s witnesses described “must-have programming” as programming that would cause subscribers to “call and disconnect” if they lost access to it.⁷⁹ That is precisely what happened when Cablevision subscribers lost access to GSN: once Cablevision announced the tiering decision, “a historically high number of Cablevision subscribers called to complain of GSN’s retiering”—over [REDACTED]—and thousands of customers disconnected.⁸⁰ Yet that made no difference to Cablevision.

Finally, the ALJ rightly found Cablevision’s remaining justifications to be pretextual. Cablevision’s reliance on the fact that GSN was out of contract whereas its affiliates were in contract—even setting aside that those different contractual statuses arose directly from discrimination, as described above—was pretextual because Cablevision showed complete flexibility in enforcing and not enforcing contractual terms with its affiliates whenever it suited

⁷⁷ *Id.*, at 60:2-21.

⁷⁸ Initial Decision, at ¶ 102; Joint Exh. 1, Bickham Dep. 107:14-19.

⁷⁹ Initial Decision, at ¶ 102, 39 n.175.

⁸⁰ *Id.*, at ¶¶ 45, 102; *see also* GSN Exh. 132, at 2.

its broader purposes.⁸¹ And Cablevision’s assertion that it could target GSN as “‘a very weak network’ that could be retired without losing subscribers” was shown to be pretextual, as discussed above, by Cablevision’s refusal to reconsider when it was proven wrong on this point by its subscribers. Moreover, the ALJ properly relied on tuning data establishing that GSN had higher viewership than a number of Cablevision’s affiliates,⁸² and on data “prov[ing] beyond any equivocation that GSN was a uniquely popular network that was highly valued by and attracted the loyalty of Cablevision subscribers.”⁸³

Thus, each of the ALJ’s conclusions regarding pretext was supported by record evidence and is subject to deference. Cablevision’s efforts to reargue this point with non-credible evidence does not justify reversal.

B. The ALJ Properly Found Circumstantial Evidence of Discrimination.

Even were the Commission to question GSN’s direct evidence, the ALJ also made detailed findings that GSN proved a circumstantial case of discrimination. In support of that circumstantial case, GSN established the two required elements. *First*, GSN proved that Cablevision treated it differently than two similarly situated Cablevision affiliates, WE tv and Wedding Central.⁸⁴ *Second*, GSN proved that Cablevision did not have a reasonable business

⁸¹ See, e.g., Initial Decision, at ¶ 108 (citing Montemagno Tr. at 1601:20-23 (Montemagno testifying that Cablevision [REDACTED]; GSN Exh. 33 (internal Cablevision email in which Cablevision’s distribution side complained that its counterpart programming side “go[es] crying to dad!” because Cablevision agreed to launch Wedding Central without a written agreement, over the objections of its distribution executives).

⁸² Initial Decision, at ¶ 103.

⁸³ *Id.*, at ¶ 80.

⁸⁴ See *Tennis Channel, Inc. v. Comcast Cable Commc’ns, L.L.C.*, 27 FCC Rcd. 8508, ¶¶ 51-55, 68 (2012) (concluding that networks were similarly situated on the basis of programming,

justification for the differential treatment. GSN established this by meeting all three of the alternative tests that the D.C. Circuit laid out in the *Tennis Channel* case.

Cablevision’s challenge to the first element of proof is simply a rehash of its disagreement with the ample evidence the ALJ relied on to find that, on the most relevant factors, GSN, WE tv, and Wedding Central were similarly situated. Its challenge to the second element flat-out ignores that *Tennis Channel* established three alternative tests for establishing discrimination by circumstantial evidence, the ALJ’s findings showing that GSN met not just one (which is all that is necessary) but all three.

1. The ALJ Correctly Applied Governing Law, Including the *Tennis Channel* Precedent.

The ALJ correctly applied the law governing circumstantial evidence of discrimination, including the D.C. Circuit’s holding in the *Tennis Channel* decision, which relates to the evidence necessary to show that differential treatment is not based on a “reasonable business purpose.”⁸⁵

As the D.C. Circuit has since explained, the *Tennis Channel* decision shifted the “evidentiary focus” of the circumstantial evidence inquiry for Section 616 cases: it is no longer sufficient for the Commission to infer discrimination based solely on evidence that an MVPD

demographics, ratings, and advertiser overlap); *TCR Sports Broad. Holding, L.L.P. v. Time Warner Cable Inc.*, Order on Review, DA 08-2441, ¶ 29 (MB Oct. 30, 2008), *rev’d on other grounds*, 25 FCC Rcd. 18099, 18105 (2010); *Herring Broad., Inc. v. Time Warner Cable Inc.*, Mem. Op. & Hearing Designation Order, 23 FCC Rcd. 14787, 14792-814, ¶ 76 (MB 2008); Second Report and Order, at ¶ 14.

⁸⁵ See *Tennis Channel*, 27 FCC Rcd. at ¶ 44; *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 985 (D.C. Cir. 2013) (framing the key issue in the case as whether Comcast has discriminated “*based on* affiliation” since “if the MVPD treats vendors differently based on a reasonable business purpose (obviously excluding any purpose to illegitimately hobble the competition from *Tennis*), there is no violation”) (emphasis in original).

offered its similarly situated affiliates preferential treatment.⁸⁶ A program carriage complainant also must establish that the MVPD's disparate treatment could not have been a legitimate business decision.⁸⁷

Specifically, under the *Tennis Channel* decision, GSN can establish the lack of such a legitimate or reasonable business purpose under any of three alternative tests: (1) under the "incremental loss" test, by showing that Cablevision incurred an equal or greater loss from favoring its affiliated networks than it would have incurred from continuing to treat the unaffiliated network equally; (2) by showing that the proffered business justification was pretextual; or (3) under the "net benefit" test, by showing that Cablevision would have obtained a "net benefit" from carrying GSN fairly.⁸⁸

GSN satisfied each of these tests. *First*, the ALJ made express findings sufficient to support the incremental loss theory. He found, and noted that Cablevision did not dispute, that Cablevision "would have saved significantly more by retiering one of its affiliated networks, including WE tv."⁸⁹ Yet Cablevision never considered tiering WE tv.⁹⁰ Indeed, Cablevision entered a new affiliation agreement with WE tv one month after placing GSN on the sports tier that guaranteed WE tv carriage on a highly penetrated tier.⁹¹

⁸⁶ *Tennis Channel, Inc. v. FCC*, 827 F.3d 137, 143-44 (D.C. Cir. 2016) ("The evidentiary focus of the inquiry had shifted from whether an MVPD offered preferential treatment to its affiliates with similar programming and costs to whether [the unaffiliated network] had shown that the MVPD could have recouped the costs of broadening coverage of the non-affiliate such that failing to do so could not have been a legitimate business decision.")

⁸⁷ *Id.*

⁸⁸ *See Comcast Cable*, 717 F.3d at 985-87.

⁸⁹ Initial Decision, ¶¶ 64 n.325, 107 n.490, 112 n.510.

⁹⁰ Joint Exh. 1, Bickham Dep. 64:1-8; 104:4-105:6; Joint Exh. 3, Dolan Dep. 133:10-15.

⁹¹ GSN Exh. 202, at CV-GSN 0361453, 0361470.

Second, as noted in Section 3, *supra*, GSN also established, and the ALJ expressly found, that Cablevision’s proffered business justifications were pretextual and therefore that its tiering of GSN was not a legitimate business decision.⁹²

Finally, while the ALJ noted that his finding of direct discrimination eliminated the need to reach the “net benefit test,”⁹³ he nevertheless made factual findings sufficient to establish that GSN met that test. He found first that Cablevision lost money by tiering GSN.⁹⁴ He recognized an overwhelming market consensus on GSN’s value proposition,⁹⁵ one that is consistent with the metrics cited by Cablevision’s own executives⁹⁶ and the substantial subscriber backlash Cablevision experienced when it tiered the network.⁹⁷ Yet, as the ALJ found, Cablevision refused to distribute GSN broadly even for “free.”⁹⁸ Further, GSN’s expert, Dr. Hal Singer, quantified Cablevision’s losses due to subscriber churn and diminished goodwill that resulted

⁹² *See, e.g.*, Initial Decision, at ¶ 86 (“Those so-called business reasons serve only as pretextual cover for engaging in discriminatory conduct, or for attempting to cover it up after the fact.”).

⁹³ *Id.* (“In light of the foregoing finding of intentional discrimination, the Presiding Judge need not reach the alternate question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN from the expanded basic tier to the premium sports tier.”).

⁹⁴ *See id.*, at ¶ 48 (finding Cablevision lost approximately 5,500 subscribers).

⁹⁵ *See id.*, at ¶ 80 (“[D]iametrically contrary to Cablevision’s assertion that GSN was retiered because it was a weak and unpopular network, the preponderance of evidence proves beyond any equivocation that GSN was a uniquely popular network that was highly valued by and attracted the loyalty of Cablevision subscribers.”). *See also* GSN Exh. 297, Goldhill Written Direct ¶ 23.

⁹⁶ *See* Joint Exh. 3, Dolan Dep. 122:7-16; Joint Exh. 1, Bickham Dep. 88:8-14; *see also* GSN Exh. 63; GSN Exh. 45; GSN Exh. 60, at 12. Indeed, Cablevision’s own research personnel warned the operator about the extreme loyalty shown by GSN viewers. GSN Exh. 296. *See also* Initial Decision, at ¶¶ 37, 39, 80, 82, 102 (discussing loyalty of GSN subscribers).

⁹⁷ Initial Decision, at ¶ 104.

⁹⁸ *Id.*, at ¶ 83.

from the tiering decision, and those losses outweigh what Cablevision claims to have saved from the tiering.⁹⁹

The ALJ's declaration that because Cablevision's proffered business justifications were pretextual he "need not reach the alternate question of whether Cablevision experienced a net benefit (or a net loss) as a result of retiering GSN" is not error. In its *Tennis Channel* decision, the D.C. Circuit made clear that the absence of evidence that the MVPD had foregone benefits in making its carriage decision was material because, in that case, "[n]either [the complainant] nor the Commission has invoked the concept that an otherwise valid business consideration is here merely pretextual cover for some deeper discriminatory purpose."¹⁰⁰ Here, by contrast, that is exactly what the ALJ found: "the possible business reasons that Cablevision has offered . . . serve only as pretextual cover for engaging in discriminatory conduct, or for attempting to cover it up after the fact."¹⁰¹

Cablevision's Exceptions erroneously state that the ALJ "expressly declined to follow the guidance of *Tennis Channel*, declaring it inapposite because GSN had proved discrimination by direct evidence."¹⁰² That claim is bizarre given that the ALJ expressly considered and applied the *Tennis Channel* decision in evaluating GSN's circumstantial case of discrimination.¹⁰³ The ALJ did not, as Cablevision erroneously suggests, ignore the *Tennis Channel* decision in

⁹⁹ GSN Exh. 301, Singer Written Direct ¶¶ 81-84 (calculating losses of [REDACTED] per month due to lost customers and [REDACTED] per month due to lost goodwill, as compared to [REDACTED] that Cablevision claimed to have saved from the tiering).

¹⁰⁰ *Comcast Cable*, 717 F.3d at 987.

¹⁰¹ Initial Decision, at ¶ 86 ("Those so-called business reasons serve only as pretextual cover for engaging in discriminatory conduct, or for attempting to cover it up after the fact").

¹⁰² Cablevision Exceptions, at 18.

¹⁰³ See, e.g., Initial Decision, at ¶¶ 64, 86, 114.

considering whether there was sufficient circumstantial evidence of discrimination to establish a violation of Section 616, even though it alternatively found that direct evidence of Cablevision's discriminatory conduct was sufficient to establish a violation of Section 616.

2. The Record Demonstrates that GSN is Similarly Situated to Cablevision Affiliates WE tv and Wedding Central.

Cablevision also challenges the ALJ's findings that GSN was "similarly situated" to Cablevision affiliates WE tv and Wedding Central.¹⁰⁴ Cablevision defines "similarly situated" so narrowly that even the networks that Cablevision admits were WE tv's closest competitors would not satisfy the test,¹⁰⁵ and it fails to demonstrate why the Commission should disregard the ALJ's extensive fact-findings and credibility determinations that are supported by the weight of the record evidence.

As the Commission has articulated, circumstantial evidence of discrimination requires a showing that the network at issue provides programming that is "similarly situated to video programming provided by a [network] affiliated with the defendant MVPD."¹⁰⁶ In evaluating whether networks are similar, the Commission looks at "a combination of factors, such as genre, ratings, license fee, target audience, target advertisers, target programming, and other factors."¹⁰⁷

¹⁰⁴ Cablevision Exceptions, at Part III.

¹⁰⁵ See, e.g., Initial Decision, at ¶ 64 (challenging Cablevision's argument that networks need to air same type of programming). Cablevision lists SoapNet as a competitor. See Cablevision Exceptions, at 35. But WE tv never aired soap operas. Initial Decision, at ¶ 64 ("[Kimberly] Martin [President and General Manager of WE tv] testified that even though WE tv's programming never included a soap opera, SoapNet was nevertheless a similar women's network" (citing Martin Testimony, at 50-51)).

¹⁰⁶ Second Report and Order, at 11504-05. Although the Order discusses the requirements in the context of proving a *prima facie* case, the two elements remain the same for adjudication on a more complete evidentiary record.

¹⁰⁷ *Id.*, at 11504.

“[N]o single factor is necessarily dispositive.”¹⁰⁸ Instead, “the more factors that are found to be similar, the more likely the programming in question will be considered similarly situated to the affiliated programming.”¹⁰⁹

In this case, the ALJ considered an extensive record—as noted above, testimony from a dozen witnesses and approximately 1,000 documentary exhibits¹¹⁰—and concluded that GSN, WE tv, and Wedding Central were and are properly described as “women’s networks”—all of which appeal “primarily to women.”¹¹¹ Among other evidence, the ALJ found “persuasive” expert testimony that “a network with an audience that is 70 percent female is ‘[d]efinitely’ a women’s network,”¹¹² and “at the time of GSN’s retiering ‘approximately 70 percent of [GSN’s] audience was a female audience.’”¹¹³ That situates GSN among a small group of women’s networks, including WE tv and Wedding Channel, with audiences that skew significantly female.¹¹⁴ The ALJ further found that both networks carried similar programming, appealed to the same target audience (in particular, women 25-54 and women 18-49), and sold advertising targeted at the same demographics and to many of the same advertisers.¹¹⁵

¹⁰⁸ *Id.*, at 11505; *See also* Initial Decision, at ¶ 110 n.505 (citing *Cordi-Allen v. Conlon*, 494 F.3d 245, 254-255 (1st Cir. 2007) (“[T]he ‘similarly situated’ requirement . . . properly understood, does not demand identity.”) (alteration in original)).

¹⁰⁹ Second Order and Report, at 11505.

¹¹⁰ *Supra* note 16, and accompanying text.

¹¹¹ Initial Decision, at ¶ 51 (citing Tr. at 1161:20-22).

¹¹² *Id.* (alterations in original) (citing Tr. at 1326:22-25).

¹¹³ *Id.* (citing Tr. at 1140:19-20).

¹¹⁴ *See id.*, at ¶ 51 n.250 (explaining evidence in record showing WE tv’s audience was 78% female and Wedding Central’s female audience was similar at time of GSN’s retiering).

¹¹⁵ *See* Initial Decision, at ¶ 110.

Cablevision now claims that the ALJ gave too much weight to the networks’ target programming, target audience, and advertising sales and targets—while ignoring other factors.¹¹⁶ In reality, Cablevision is asking the Commission to re-litigate the similarity of the networks on the basis of “cherry picked” evidence that the ALJ considered and rejected as non-credible.

Yet, Cablevision’s claims of purity with respect to its evidence of dissimilarity collapse on even a cursory examination of the record. Cablevision conveniently ignores that much of the expert analysis on which it relied to show dissimilarity between GSN and Cablevision’s affiliates WE tv and Wedding Central neglected to compare GSN’s performance on those metrics to the networks in WE tv and Wedding Central’s admitted competitive set.¹¹⁷ When GSN asked the experts to make those comparisons on cross-examination, it became clear that GSN actually *outperformed* members of WE tv’s self-identified competitive set under the experts’ own tests.

Thus, while Cablevision’s appeal chides the ALJ for ignoring its advertising expert’s testimony that differences in demographic ratings proved “significant differences in the actual audiences delivered by WE tv and GSN,” it conveniently omits that, on *its own expert’s metrics*, GSN was as close or closer to WE tv in demographic ratings than were [REDACTED] — two networks that he alleged are within WE’s competitive set.¹¹⁸ Cablevision further claims in its exceptions that GSN and WE tv had, “sharp differences in . . . audience,”¹¹⁹ yet *its own expert economist’s* audience duplication test showed that GSN was closer than WE tv’s admitted

¹¹⁶ Cablevision Exceptions, at 20-21.

¹¹⁷ See, e.g., Blasius Tr. 2431:18-2432:12 (Cablevision advertising expert did not apply skew analysis to WE tv’s competitive set), 2467:17-2468:7 (same for demographic ratings), 2489:10-18; CV Exh. 334, Orszag Written Direct ¶ 8 (identifying WE tv’s competitive set but failing to compare GSN’s performance on audience similarity analyses with those networks).

¹¹⁸ Cablevision Exceptions, at 32-33; GSN Exh. 443; Blasius Tr. 2487:2-2489:5.

¹¹⁹ Cablevision Exceptions, at ii.

competitor [REDACTED] in terms of audience overlap with WE tv by persons at least 18 years of age.¹²⁰ On that expert's "switching" analysis, which purported to show audience similarity based on the viewers who watched both networks, GSN performed better than *four* other networks within WE tv's competitive set—including Cablevision affiliate Wedding Central.¹²¹

An analysis of each of the similarity factors betrays a similar disconnect between Cablevision's bare assertion of dissimilarity and the ALJ's considered factual findings favoring GSN.

Target Programming and Genre: The ALJ credited and found persuasive the volume of record evidence that demonstrated that GSN's target programming, like that of WE tv and Wedding Central, consisted of women-oriented shows.¹²² All three networks primarily aired "[g]ame shows, wedding shows, dating shows, and family dynamic shows," which "all appeal primarily to women."¹²³ The ALJ credited testimony that "game shows currently and historically attract an adult female audience."¹²⁴ That evidence was corroborated by evidence of other similarities between GSN, WE tv and Wedding Central, including that talent from WE tv programming appeared on GSN; that, prior to it being shuttered, Wedding Central announced it

¹²⁰ CV Exh. 334, Orszag Written Direct Table 8; Orszag Tr. 2620:15-24.

¹²¹ CV Exh 334, Orszag Written Direct Table 4, Table 5; Orszag Tr. 2615:1-21, 2617:5-24, 2618:18-2619:2.

¹²² Initial Decision, at ¶¶ 59-64.

¹²³ *Id.*, at ¶ 59 (alteration in original) (citing Brooks Expert Testimony at 51).

¹²⁴ *Id.*, at ¶ 60 n.303. As the ALJ noted, WE tv also aired its own game show *Most Popular*. *Id.*, at ¶ 63.

would air GSN's marquee show, *The Newlywed Game*; and that there was extensive additional evidence about GSN's efforts to orient its original programming to female viewers.¹²⁵

The ALJ specifically considered and rejected the so-called "substantive" genre analysis undertaken by Cablevision expert Michael Egan that purported to conclude that GSN was wholly different than WE tv and Wedding Central, labeling Mr. Egan's testimony as "not credible."¹²⁶ Mr. Egan based his analysis on subjective attributes that he applied selectively to distinguish GSN programming from WE tv and Wedding Central programming.¹²⁷ Instead, the ALJ correctly found a close relationship between game shows and reality programming because competition shows are "a subcategory of reality programming."¹²⁸ As the ALJ concluded, "it is not necessary to the finding of similarity that the networks air the *same type* of women-oriented programming."¹²⁹ Indeed, WE tv considered itself similar to, and competed with, other women's networks, like SoapNet, that did not air the same type of women-oriented programming.¹³⁰

¹²⁵ *Id.*, at ¶ 63 (providing that contestants from GSN's *The Newlywed Game* had been on WE tv's *Bridezillas* and that Wedding Central announced it would begin airing *The Newlywed Game* before it was shuttered in 2011); *see also id.*, at ¶ 61 n.308

¹²⁶ Cablevision Exceptions, at 25.

¹²⁷ Initial Decision, at ¶ 62 ("Egan's defining attributes of a game show would apply equally to televised programming that is not commonly referred to as a game show"). Cablevision makes the, at best, misleading argument that GSN's expert witness, Timothy Brooks, "purported to opine on the nature of the programming without viewing any of it. By contrast, Mr. Egan watched all or parts of multiple episodes of [a number of WE tv and GSN programs.]" Cablevision Exceptions, 25-26 n.122. Point of fact, Mr. Brooks is the co-author of a treatise on cable programming, and he testified that, as part of that occupation, he has "watched the premiers of all new shows on [GSN and WE tv], and virtually every other network, too, for that matter." *See Brooks Tr.* 1347:13-16. And Mr. Egan, which Cablevision states watched all the programming he opined on, acknowledged that he did not watch all the programming but instead relied on a third party's notes and summaries. *See Tr.* 2185:19-23.

¹²⁸ Initial Decision, at ¶ 62 (citing GSN Exh. 300, Brooks Revised Direct Testimony at 56-58).

¹²⁹ *Id.*, at ¶ 64. The ALJ provides additional support from precedent: "[I]n *Tennis Channel* [ALJ] found that a cable network that aired sports programming dedicated to tennis was similar to a

Target Audience: The ALJ also found “[t]he preponderance of substantial and undisputed record evidence clearly and convincingly prove[d]” GSN, WE tv, and Wedding Central all targeted the same women viewers.¹³¹ Relying on “unequivocal[]” testimony, the ALJ determined that “GSN’s target programming was primarily women 25-54, next women 18-49,” which was the same for the other two networks.¹³² Indeed, the ALJ found company testimony on targeting women demographics so convincing that he determined there is “no doubt that GSN was targeting the same women viewers who were being targeted by WE tv and Wedding Central.”¹³³ He also found support for this conclusion in evidence that after Cablevision subscribers lost access to GSN, viewership increased for WE tv and Wedding Central, along with other women-oriented networks, in the relevant homes.¹³⁴

Although the ALJ’s determination with respect to similarity of target audiences finds “overwhelming”¹³⁵ support in the record, Cablevision seeks to re-litigate the issue by citing select documents in which GSN “emphasized . . . wide appeal” to both women and men.¹³⁶ In doing so, Cablevision entirely ignores the ALJ’s extensive consideration of those materials,

cable network that aired sports programming dedicated to golf, as well as similar to a cable network that aired a variety of sports programming—findings that were later adopted by the Commission and left undisturbed by the D.C. Circuit” *Id.* (citing *Comcast Cable*, 26 FCC Rcd. at 17170-85 and *Tennis Channel*, 27 FCC Rcd. at 8527-33).

¹³⁰ *Id.*, at ¶ 39.

¹³¹ *Id.*, at ¶ 65.

¹³² *Id.*

¹³³ *Id.*, at ¶ 66.

¹³⁴ *Id.*, at ¶ 68. Cablevision challenges this determination by claiming the switching was *de minimis* and that the ALJ misconstrued it to find commonalities in viewership, but the evidence do not disprove the substantial record otherwise showing the networks share a target audience.

¹³⁵ *Id.*, at ¶ 66.

¹³⁶ See Cablevision Exceptions, at 30 (citing Initial Decision, at ¶ 57).

together with testimony by both GSN and Cablevision fact witnesses—including President and General Manager of WE tv Kim Martin—confirming that it is not relevant that GSN, like other women’s networks, tries to differentiate itself in marketing pitches since that is what all networks do.¹³⁷ The ALJ properly considered these marketing materials in context.¹³⁸

Cablevision’s other audience challenge consists of pointing to demographic differences between the actual audience of GSN and WE tv. The argument is unpersuasive, as evidenced by the fact that Cablevision has no data on Wedding Central’s audience demographics¹³⁹ yet its witnesses readily concede Wedding Central is substantially similar to WE tv.¹⁴⁰ Further, the ALJ was correct to conclude that “it is a network’s target audience, not its actual audience, that drives advertising and programming decisions,”¹⁴¹ given ample record evidence in support of that view, including the fact that network performance is determined by a network’s ability to reach its core audience, with additional viewers outside that audience being viewed as “bonus” viewers.¹⁴² Expert testimony reflected that “advertisers generally are not concerned with the

¹³⁷ Initial Decision, at ¶ 57 n.291 (“Martin testified that Wedding Central differentiated itself from other women’s networks ‘for [cable] distributors, for viewers and for advertisers.’”).

¹³⁸ Cablevision suggests that “marketing” is a separate factor that the ALJ should have considered. In the unlikely event two networks were to market themselves as similar, the ALJ would of course be free to consider that as further evidence of similarity, even though it is not an enumerated factor under the program carriage rules. 47 CFR § 76.1302(d)(3)(iii)(B)(2)(i). However, the ALJ was correct not to treat these marketing materials as dispositive or even particularly probative given the evidence that networks use these materials to differentiate themselves from competition. Initial Decision, at ¶ 57 n.29.

¹³⁹ Initial Decision, at ¶ 51 n.250 (noting Wedding Central’s audience had to be assumed). *See also* GSN Exh. 300, Brooks Written Direct, at ¶ 100 (stating that Wedding Central was never rated by Nielsen).

¹⁴⁰ Initial Decision, at ¶ 69 n.340.

¹⁴¹ *Id.*, at ¶ 70.

¹⁴² *Id.* at ¶ 74 (citing Brooks Tr. 1253:5-7).

composition of a network's actual audience but focus on the demographic they are interested in reaching."¹⁴³ Second, audience can always be parsed at a granular level; the ALJ correctly relied on sound data showing that the networks were comparable in sharing a high level of female viewership.¹⁴⁴

Target Advertising: The ALJ also appropriately considered the weight of the evidence to determine that GSN's advertising practices demonstrate it is a women's network.¹⁴⁵ Both networks targeted and actually sold advertising to companies seeking to reach persons and women 18-49 and 25-54.¹⁴⁶ Two-thirds of GSN's demographic advertising sales at the time of retiering were for "persons and women 18 to 49 and 25 to 54." Within these categories, "women 25-54 alone accounted for nearly 40 percent of GSN's upfront advertising sales."¹⁴⁷ WE tv and, before it was shuttered, Wedding Central shared that focus on persons and women 18-49 and 25-54.¹⁴⁸

¹⁴³ *Id.* Cablevision simply states that the ALJ ignored testimony resting "on the unremarkable proposition that advertisers are only willing to pay for viewers that they reach," but does not appropriately grapple with the testimony the ALJ determined was relevant. Cablevision Exceptions, at 33.

¹⁴⁴ Initial Decision, at ¶ 51 (finding that GSN's audience was about 70 percent female).

¹⁴⁵ *Id.*, at ¶¶ 71-77.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*, at ¶ 75 (internal quotations omitted).

¹⁴⁸ See, e.g., GSN Exh. 310 (WE tv document [REDACTED]
[REDACTED]; GSN Exh. 334, at 2 (Internal WE tv document [REDACTED]); GSN Exh. 338, at 2 (WE tv document characterizing [REDACTED]).

Further, the ALJ properly credited extensive testimony that GSN and WE tv were “virtually identical” in the advertisers they target and the brands that advertise on them.¹⁴⁹ As the ALJ observed, GSN and WE tv shared the same top advertisers: 90 percent of WE tv’s top 40 advertising accounts advertised on GSN and 93 percent of GSN’s top 40 advertising accounts advertised on GSN.¹⁵⁰ GSN seeks to re-litigate an argument that it made and was appropriately rejected at trial: that the significant overlap in material is “immaterial” because the advertisers are large corporate entities with multiple brands.¹⁵¹ GSN submitted testimony that there was not only the same advertisers – but also the same brands – that advertised on WE tv and GSN.¹⁵² Likewise, Cablevision selectively points the Commission to evidence of an instance in which DIRECTV sold GSN as part of an “adults” advertising cluster. Cablevision does not cite the extensive record evidence that all women’s networks, including WE tv itself, sell some advertising for adults and even males.¹⁵³ The weight of record evidence properly credited by the ALJ is clear that WE tv and GSN both targeted and reached the same advertising demographics and competed for the precise same advertisers.

¹⁴⁹ Initial Decision, at ¶ 77 (quoting Lawrence Blasius, Principal, Blasius Media & Marketing).

¹⁵⁰ *Id.*, at ¶ 76-77.

¹⁵¹ Cablevision Exceptions, at 34.

¹⁵² GSN Exh. 301, Singer Direct Test. ¶ 52, Table 6.

¹⁵³ *See, e.g.*, GSN Exh. 310 (WE tv document [REDACTED]
[REDACTED]; GSN Exh. 334, at 2 (Internal WE tv document [REDACTED]); GSN Exh. 338, at 2 (WE tv document characterizing [REDACTED]).

Other Factors: In its Exceptions Cablevision also cherry picks other evidence that it asserts should have received greater weight, including carriage contracts,¹⁵⁴ sizzle reels,¹⁵⁵ and consumer surveys.¹⁵⁶ Likewise, while Cablevision asserts that the ALJ ignored evidence that WE tv did not consider GSN a competitor,¹⁵⁷ it ignores that some of WE tv's own documents listed GSN as within WE tv's admitted competitive set.¹⁵⁸ In essence, Cablevision seeks to re-litigate these issue by selectively pointing the full Commission to certain factors that the ALJ considered and found less probative or non-credible. At a minimum, the Commission precedent is clear that no single factor is dispositive as to the question of whether two networks are similarity situated. And in this case, the ALJ considered the entirety of the record and appropriately concluded that "GSN, WE tv, and Wedding Central are women's networks that offered similar target programming to the same target audience"¹⁵⁹ based on a searching review of the record and a balanced and thorough analysis.

C. The ALJ Properly Found that Cablevision Has Materially Interfered with GSN's Ability to Compete in the Marketplace.

The Presiding Judge correctly applied the standard for harm articulated by the Commission and found, based on the preponderance of substantial and undisputed evidence, that Cablevision's discriminatory conduct "significantly and negatively impacted GSN's advertising and license fee revenue and unreasonably restrained GSN's ability to compete fairly against

¹⁵⁴ Cablevision Exceptions, at 23-24.

¹⁵⁵ *Id.* at 26.

¹⁵⁶ *Id.* at 27.

¹⁵⁷ *Id.*, at 35 (citing testimony of Elizabeth Dorée, Senior Vice President, Programming Strategy & Acquisitions for WE tv, to argue WE tv did not track GSN as a competitor).

¹⁵⁸ *See, e.g.*, GSN Exh. 400 (presenting internal WE tv "competitive fringe ranker" slide listing GSN along with other of WE tv's admitted competitors).

¹⁵⁹ Initial Decision, at ¶ 111.

other female-targeted networks, including similarly-situated WE tv.”¹⁶⁰ Uncontroverted evidence demonstrates that Cablevision’s conduct resulted in substantial losses to GSN in subscribers, license fee revenue, ratings, advertising revenue, negotiating position with other MVPDs, and ability to compete with similarly situated networks — all of which amounted to an unreasonable restraint on GSN’s ability to compete fairly in both the New York and national markets. Cablevision’s attempt to import antitrust doctrine into Section 616 has been rejected by the Commission and the courts and ignores the market power Cablevision possesses in New York.

In evaluating whether a programmer has been unreasonably retrained in its ability to compete fairly, the Commission looks to the impact of the MVPD’s conduct on the programmer’s “subscribership, license[] fee revenues, advertising revenues, ability to compete for advertisers and programming, and ability to realize economies of scale.”¹⁶¹ The Presiding Judge analyzed these factors to conclude not just that GSN had been harmed, but that it had been unreasonably retrained in its ability to compete fairly.¹⁶²

Cablevision acknowledges there is ample evidence of substantial harm.¹⁶³ GSN lost approximately [REDACTED] subscribers as a direct result of Cablevision’s action.¹⁶⁴ This loss represented 96 percent of GSN’s subscribers on Cablevision systems and 4 percent of GSN’s subscribers nationwide. At a license fee of [REDACTED] per subscriber per month, GSN has lost

¹⁶⁰ Initial Decision, at ¶¶ 87, 115.

¹⁶¹ Second Report and Order, at 11505 n.60.

¹⁶² See Initial Decision, at ¶¶ 87-93, 115-16.

¹⁶³ Cablevision Exceptions, at 36-37.

¹⁶⁴ Initial Decision, at ¶ 89.

approximately [REDACTED] in license fee revenue every year since the tiering event.¹⁶⁵ The Presiding Judge also credited the testimony of GSN Executive Vice President for Advertising Sales John Zaccario, who testified that GSN has lost at least [REDACTED] in advertising revenue every year as a direct result of Cablevision's conduct.¹⁶⁶ In aggregate, this direct annual loss of nearly [REDACTED] has had a substantial impact on GSN's ability to invest in programming, marketing, and talent, and thus to compete fairly with WE tv and other women's networks. GSN President and CEO David Goldhill testified that the loss represents [REDACTED] of GSN's overall television profit, which impacts its ability to develop and launch original programming, which brings in new audiences and drives advertising revenue and relationships with MVPDs.¹⁶⁷

Cablevision nevertheless suggests that, because GSN has ultimately increased its distribution and advertising revenue since the tiering, GSN did not suffer any harm. This, of course, is not the test under Section 616. "There is nothing inconsistent about a network attracting viewers, programming, and advertising to become similarly situated to other networks and yet being unreasonably restrained from finding greater success . . . due to discrimination by an MVPD."¹⁶⁸ GSN's hard-won growth does not annul the unreasonable restraints on its ability to compete, both locally and nationally, that flow directly from Cablevision's discriminatory conduct.

¹⁶⁵ *Id.* at ¶ 88.

¹⁶⁶ *Id.* at ¶ 90.

¹⁶⁷ Tr. 234:9-21 & 235:11-15 (Goldhill).

¹⁶⁸ *Tennis Channel, Inc.*, 27 FCC Rcd. at 8532-33.

It is nonsensical for Cablevision to argue that the harm suffered by GSN, a small, independent network, was not significant enough to restrain its ability to compete when, at the same time, the much larger Cablevision argues that the money it saved from retiering GSN was “not an insignificant number” and was a “material amount of money” to its more sizable bottom line.¹⁶⁹ GSN lost [REDACTED] of its annual advertising revenue and [REDACTED] of its subscribers as a direct result of Cablevision’s conduct, while Cablevision saved [REDACTED] [REDACTED] of its annual programming budget.¹⁷⁰ By the time of the hearing in 2015, GSN had lost [REDACTED] in license fee and advertising revenue due to Cablevision’s conduct, losses that have only increased since then.¹⁷¹

Testimony from Cablevision’s own witnesses establishes the substantial harm caused by the tiering. As the Presiding Judge noted, WE tv President Kim Martin testified that “[m]ore distribution leads to more ad revenue,” and that carriage decisions by one MVPD “can have a domino effect on the carriage decisions of other distributors.”¹⁷² Ms. Martin also acknowledged that being repositioned in top markets can be “devastating” to the repositioned network.¹⁷³

Cablevision’s witnesses similarly acknowledged the disproportionate harm from exclusion from the New York marketplace, where Cablevision serves 61 percent of homes.¹⁷⁴ As Cablevision’s Chief Executive James Dolan conceded, [REDACTED]

¹⁶⁹ See Cablevision Exceptions, at 11 & n.55; see also GSN Exh. 351, at 37 (Cablevision Securities and Exchange Commission Form 10-K for the fiscal year ended December 31, 2013, showing that in 2011, the year of the tiering, Cablevision reported net revenue of \$6.1 billion).

¹⁷⁰ Initial Decision, at ¶¶ 89, 90, 116.

¹⁷¹ *Id.* at ¶ 87 n.411.

¹⁷² *Id.*, at ¶ 91.

¹⁷³ GSN Exh. 10.

¹⁷⁴ GSN Exh. 301, Singer Written Direct ¶ 115.

¹⁷⁵ Among other reasons, this is because of the uncontested influence the New York marketplace has on key industry figures, such as advertisers, and the harm a network suffers in not being available to those key figures.

In an effort to insulate itself from any remedy for its illegal discrimination, Cablevision asks the Commission to apply antitrust standards to program carriage regulations, drawing on a concurrence in the *Tennis Channel* decision that the court refused to adopt.¹⁷⁶ This is a request that the Commission has consistently declined. The Commission has held that program carriage complainants are not required to show that a defendant MVPD has “bottleneck” monopoly or market power.¹⁷⁷ “Section 616 would serve no function if it existed simply as a redundant analogue to antitrust law. Nothing in the text of Section 616 indicates an intent to mimic existing antitrust law or the ‘essential facilities’ doctrine.”¹⁷⁸

But the Second Circuit has made clear that, because *no* cable system provides nationwide coverage, the relevant marketplace should be not the entire nation but rather Cablevision’s local coverage area: i.e., the “discrete geographic areas defined by the boundaries of [Cablevision’s] individual [cable] systems.”¹⁷⁹ The legislative history of Section 616 confirms that,¹⁸⁰ and even

¹⁷⁵ Joint Exh. 3, Dolan Dep. 11:3-18.

¹⁷⁶ Cablevision Exceptions at 37-38 (quoting *Comcast Cable*, 717 F.3d at 988, 992-94 (Kavanaugh, J., concurring)).

¹⁷⁷ *Tennis Channel, Inc.*, 27 FCC Rcd. at 8523 (“We find no support for this standard or for the notion that Congress’s concern in passing Section 616 was, as Comcast argues, cable operators’ ‘then-bottleneck power.’ Congress applied Section 616 to all MVPDs . . .”).

¹⁷⁸ *Id.*

¹⁷⁹ *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 144 (2d Cir. 2013); *see also id.* at 162-63 (“If a vertically integrated cable operator . . . has the ability to prevent an unaffiliated network from reaching a substantial portion of consumers in [the local MVPD] market[,] [i]t thereby may

the *Tennis Channel* concurrence that Cablevision relies upon recognizes that “[i]n some local geographic markets around the country, a video programming distributor may have market power.”¹⁸¹

Viewed on a local level, Cablevision plainly has bottleneck power. Reflecting Cablevision’s 61% share in the New York DMA, GSN suffered a New York decline of 60 percent in household viewership following the tiering and a decline of 80 percent to 90 percent in viewership among its principal female demographics.¹⁸² This level of loss is devastating. Given Cablevision’s plain intent to appeal as far as possible, GSN asks the Commission to find harm at both a national and market-specific level.

II. CABLEVISION HAS NO FIRST AMENDMENT RIGHT TO DISCRIMINATE.

Courts and the Commission have “repeatedly considered, and rejected” arguments like Cablevision’s that carriage remedies violate the First Amendment.¹⁸³ To the extent that such remedies implicate First Amendment rights, the law is “well-settled” in demonstrating that

significantly inhibit the unaffiliated network’s ability to compete fairly in that area’s video programming market.”).

¹⁸⁰ The legislative history of the 1992 Cable Act clearly sets forth a concern with locally-derived market power. *See* H.R. Conf. Rep. 102-862, at 55-56 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 1231 (“For a variety of reasons, . . . most cable television subscribers have no opportunity to select between competing cable systems.”); S. Rep. 102-92, at 8-9 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 1133 (“A cable system serving a local community, with rare exceptions, enjoys a monopoly. . . .”). *See also* *Time Warner Cable*, 729 F.3d at 146 (explaining that Section 616 was motivated by Congress’s concern that “a cable operator would be able to ‘abuse its locally-derived market power to the detriment of programmers’”) (quoting S. Rep. 102-92, at 24).

¹⁸¹ *Comcast Cable*, 717 F.3d at 992 n.3 (Kavanaugh, J., concurring).

¹⁸² Initial Decision, at ¶ 90.

¹⁸³ *See, e.g., In the Matter of Tennis Channel, Inc., Complainant*, 27 FCC Rcd. 9274, 9284 (GC 2012) (collecting cases).

“intermediate scrutiny . . . is the appropriate standard.”¹⁸⁴ Cablevision’s arguments that carriage remedies should be subject to strict scrutiny because they are content-based or that, in the alternative, the Commission lacks an adequate government interest to withstand either strict or intermediate scrutiny are the same tired arguments that have been rejected under well-established precedent.¹⁸⁵

Courts and the Commission have consistently found carriage remedies to be “content-neutral” and thus able to survive First Amendment challenges where they (i) advance “important or substantial” government interests, using (ii) “means [that] do not burden substantially more speech than necessary to achieve the aim.”¹⁸⁶ To this day, the Commission recognizes a substantial government interest in “promoting diversity and competition in the video programming market”¹⁸⁷ largely “because MVPDs have an incentive to shield their affiliated

¹⁸⁴ *Id.* at 9284. *See also Comcast Cable*, 717 F.3d at 993 (Kavanaugh, J., concurring) (“[U]nder the Supreme Court’s precedents, Section 616’s impact on a cable operator’s editorial control is content-neutral and thus triggers only intermediate scrutiny” (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-643 (1994))). There is, however, an open question about the extent to which the First Amendment protects a cable operators from an order that requires broader carriage of a network that the cable operator already carries: in essence, Cablevision is asking the Commission to find that the First Amendment protects its ability to charge subscribers an additional fee per month for GSN. That is not well-settled law. *Cf. Turner Broad. Sys.*, 512 U.S. at 636.

¹⁸⁵ *See Cablevision Exceptions*, at 38 n.181. The Commission has emphatically rejected this argument. *See In the Matter of Tennis Channel, Inc.*, 27 FCC Rcd. at 9284 (rejecting idea that the “similarly situated” analysis under Section 616 demonstrates the regulations are content-based and subject to strict scrutiny).

¹⁸⁶ *See Time Warner Entm’t Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996); *In re Tennis Channel*, 27 FCC Rcd. at 9284 (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1994); *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

¹⁸⁷ *See id.* *Time Warner* was a case about leased access requirements, but there are similarities in the aims of those requirements and the goals of program carriage rules. *See Second Report and Order*, ¶ 32 (“The program carriage rules, like the leased access requirements, promote diversity in video programming by promoting fair treatment of unaffiliated programming vendors and

programming vendors from competition with unaffiliated programming vendors.”¹⁸⁸ Thus, courts and the Commission have consistently found that an order of mandatory carriage to remedy anti-competitive practices, such as past discrimination by an MVPD on the basis of non-affiliation, does not violate the Commission’s established constitutional standard.

Cablevision’s market spin on its First Amendment argument—that there might be a First Amendment interest in barring discrimination by other MVPDs, but not by Cablevision, because it is somehow too small as the nation’s fifth-largest MVPD¹⁸⁹—fails for the reasons discussed in Part I.C above. Section 616 does not require a showing of nationwide market power,¹⁹⁰ even though Cablevision admits, from its Chief Executive down, the national influence its unique New York market power gives it.¹⁹¹ In addition, if market power were relevant, Cablevision’s overwhelming market power within the communities that it serves implicates a serious governmental interest.¹⁹²

providing these vendors with an avenue to seek redress of anticompetitive carriage practices of MVPDs.”)

¹⁸⁸ See Second Report and Order, at ¶ 32 (providing thus that “the program carriage rules promote competition in the video programming market by promoting fair treatment of unaffiliated programming vendors”).

¹⁸⁹ See Initial Decision, at ¶ 13 (citing Dolan Testimony, at 6-9; GSN Exh. 232).

¹⁹⁰ *Time Warner Cable*, 729 F.3d at 161 (explaining it only requires “show[ing] a reasonable basis for concluding that *some* markets exist in which MVPDs have the incentive and ability to harm unaffiliated networks and that application of the program carriage regime will alleviate that harm.”).

¹⁹¹ See *supra* notes 169-171 and accompanying text (discussing Cablevision’s market power).

¹⁹² *Id.*

Cablevision’s alternative First Amendment argument regarding its merger with Altice would render Section 616 toothless.¹⁹³ This argument is procedurally improper and legally wrong.

Procedurally, if Cablevision thought its merger was relevant to a pending carriage ruling, it should have presented that argument to the ALJ over a year ago when the merger was announced,¹⁹⁴ and when the ALJ could have generated a fair record as to whether it affected any aspect of this decision. Cablevision cannot fairly lay low on this point, gambling on a favorable decision, and then when its gamble proves wrong seek to reverse the decision with self-serving evidentiary claims that are not subject to fair challenge.¹⁹⁵

The Altice argument is legally irrelevant for two reasons. First, as a legal matter Altice accepted responsibility for Cablevision’s liabilities—necessarily including this litigation and any potential remedies flowing from it—by virtue of its merger with Cablevision.¹⁹⁶ Cablevision

¹⁹³ Cablevision Exceptions, at 39.

¹⁹⁴ See Cablevision Stay Pet., Exh. A, ¶ 9 (providing announcement of merger in September 2015).

¹⁹⁵ At this point in the proceeding, the record has closed. Given the arguments presented, there is no persuasive reason for the Commission to reopen the record and delay the resolution of this proceeding.

¹⁹⁶ See Agreement and Plan of Merger Among Cablevision Systems Corp., Altice N.V., and Neptune Merger Sub Corp. § 1.1 (Sept. 16, 2015) (providing specific evidence of continuity since Cablevision Systems Corp.—the existing Cablevision holding company—will be the entity that survives the merger); § 5.1(g) (including warranty by Cablevision that there are “no civil, criminal or administrative actions, suits, claims, hearings, arbitrations, investigations or other proceedings pending or, to the knowledge of the Company, threatened in writing” that would have a “Material Adverse Effect” on Altice).

Precedent from courts and the Commission also suggest that Altice cannot escape the liability. See, e.g., *United States v. Vernon Home Health, Inc.*, 21 F.3d 693, 696 (5th Cir. 1994) (“[A]ny purchase of assets that involves the assignment of the provider agreement is subject to the relevant statutory and regulatory conditions.”); *Beverly Enters. v. Califano*, 460 F.Supp. 830 (D.D.C. 1978) (holding purchaser of stock of corporate owners of nursing home liable for

simply cannot evade the enforcement of the portion of the order it does not like by using its change of ownership as a shield.

Second, Cablevision's argument ignores the reality of its discriminatory conduct. Cablevision tiered unaffiliated GSN and locked in favorable carriage for its affiliated networks before the Altice merger. The consequences of that discrimination still persist and influence Cablevision's current treatment of GSN versus WE tv. Because of that history, the harm to competition and diversity in the video marketplace persists until GSN's carriage is restored. Restoration of carriage is thus necessary to remedy the prior discrimination and restore GSN to market-based carriage. A corporate merger neither cures discrimination nor remedies the wrong from that discrimination. The governmental interest in remedying that wrong and restoring a competitive marketplace plainly justify a carriage order that requires Cablevision to carry GSN broadly rather than to continue to upcharge its subscribers for GSN.

Medicare overpayments to corporation). While the Communications Act does not expressly address successor liability, the Commission should necessarily find that Altice has assumed Cablevision's liabilities because Altice's business operations have "substantial continuity" with those of Cablevision. *See In the Matter of Alltel Commc'ns, Inc.*, 20 FCC Rcd. 8112, 8114 (EB 2005).

CONCLUSION

For the reasons set forth above, the Commission should uphold the Initial Decision and require Cablevision to restore GSN to broad carriage on its expanded basic tier as soon as practicable.

Respectfully submitted,



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